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In the Supreme Court of the United States

No. 393.

OCTOBER TERM, 1943.

HARRY J. WISNER,
Appellant,

vs.

KATHLEENE KAMINSKI, a.k.a.
CATHERINE MILLER WISNER KAMINSKI.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

PETITION FOR REHEARING.

RALPH ATKINSON,
352 East State Street,
Salem, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

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THE SUPREME COURT OF THE STATE OF OHIO.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, J. Frederick Bryan, both as the administrator with the will annexed of the Estate of Harry J. Wisner, deceased, and individually, respectfully prays, for the several reasons hereinafter set forth, for a rehearing of the matter of Your Honors' decision of December 6, 1948, which dismissed the appeal in this case for want of a substantial federal question.

SUPERVENING FACTS.

Since the taking of this appeal, appellant Harry J. Wisner has died. Simultaneously with the filing of this petition, the petitioner, J. Frederick Bryan, both in his capacity as the administrator with the will annexed of the Estate of Harry J. Wisner, deceased, and *individually,* is filing an application to be substituted as party appel-

lant. As appears both from Mr. Bryan's said application and from the late Mr. Wisner's jurisdictional statement, Mr. Bryan was entitled to notice at the outset of the proceedings in this case; he is the late Anna Miller Wisner's son and Mrs. Kaminski's brother. However, like his stepfather, the late Mr. Wisner, he was never served with notice or process of any kind, substituted or actual. As a result, although he of course learned at the time Mr. Wisner intervened in this case in the Court of Appeals that Mr. Wisner was being forced to defend still another litigation started by Mrs. Kaminski, Mr. Bryan had no knowledge whatever that the character of the litigation was such as to involve his own rights until he began to look into Mr. Wisner's affairs after his death, when this case was already pending on appeal in this Court.

FEDERAL QUESTIONS PRESENTED.

The facts of this case cover a rather long period of time, and are therefore voluminous enough, that they may to some extent have obscured the constitutional questions presented. The questions will therefore be restated briefly here. Stating the most important question first, but leaving the order in which the questions are stated otherwise unaltered from that adopted in the jurisdictional statement, the federal constitutional questions relied on in this case are as follows:

Question 1.

Where a state statute as interpreted and applied authorizes the state courts to render if they so desire, and they do render, final judgment in favor of an applicant-plaintiff and against persons adversely interested without giving said persons any chance to introduce evidence on the merits or to be heard otherwise on the merits at any stage of the case, trial or appellate, is said statute invalid because repugnant to § 1 of the XIV Amendment?

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Comment: The answer to the foregoing question, which arises twice in this case, on each of two separate and distinct sets of facts, is thought to be "yes" for two reasons:

(a) The statute is repugnant to the due process clause because it permits the state courts to cut off persons' rights without giving them any chance to defend them.

(b) The statute is repugnant to the equal protection clause because of its unequal and capricious operation. Under the interpretation given it in this case, the state courts may in one case let both sides be heard on the merits, but in the next case, deny any hearing to the defense. In this case, a chance to be heard on the merits *was* denied to the defense.

Question 2.

Where a pleading filed in a state court and entitled "Application to Appoint Successor Fiduciary" is so equivocal and ambiguous that the reality of a hearing on its merits is an impossibility for parties adverse to the pleader because they have no way to determine what they are required to defend against, and where the state appellate courts nevertheless sustain the validity of said pleading, reverse the trial court, and render final judgment for the pleader, holding that such pleadings are authorized by a certain state statute, are said pleading and statute invalid because repugnant to § 1 of the XIV Amendment?

Comment: The answer to the foregoing question is thought to be "yes" for the reason that the statute is repugnant to the due process clause. "Due process" means that a fair chance must be given, not only to prosecute remedies, but also to defend against them. It is possible for a pleading so artfully to befuddle and confuse adverse parties, and also the courts, that the adverse parties are worse off than if all pretense of disclosing to them what

they are required to defend against had been openly abandoned. It is a fact, plain from the record, that the "Application to Appoint Successor Fiduciary" was of such character that it had exactly that result when, in the error proceeding in the Court of Appeals, the late Mr. Wisner tried to defend there the judgment of the Probate Court.

Question 3.

As interpreted and applied, a state statute authorizes a state court if it so desires to formulate a judgment granting an "Application to Appoint Successor Fiduciary," and it does formulate it, in terms so equivocal that it is impossible to determine which of two or more possible kinds of fiduciary it is a judgment for. This is prejudicial to persons whose interests are adverse to the applicant's, since, on each of the various possible theories of the judgment, the law gives them entirely different sets of rights under it. Moreover, unless they exercise their rights *before* the "fiduciary" is appointed, their rights will be forfeit. However, they cannot find out which kind of fiduciary the "fiduciary" is to be except by litigating the question *after* he has been appointed. As applied, the statute therefore authorizes the state court to destroy such persons' rights by capriciously concealing from them what their rights are until it is too late to exercise them.

Question: As thus interpreted and applied, is said statute invalid because repugnant to § 1 of the XIV Amendment?

Comment: The answer to the foregoing question is thought to be "yes" for two reasons:

(a) The statute is repugnant to the due process clause because it permits a court to destroy persons' rights arbitrarily and without reason.

(b) The statute is repugnant to the equal protection clause because its operation is capricious and unequal. A court may save the rights of persons adverse to the appli-

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cant in one case and destroy them in the next accordingly as the mood strikes it. In this case, it has seen fit to destroy their rights.

Question 4.

As interpreted and applied, a state statute authorizes a state appellate court to render final judgment against persons adversely interested and for the plaintiff in an alleged action to open a former guardian's accounts (which action was not appealed to it) without having any means of knowing what the merits of the alleged action are; the trial court never tried said action and consequently no evidence was ever received on its merits. The statute is also interpreted and applied to permit the appellate court to give judgment against persons adversely interested without any means of knowing whether an action was ever commenced; the pleadings in the alleged action are not in the record before it.

Question: As thus interpreted and applied, is said statute invalid because repugnant to § 1 of the XIV Amendment?

Comment: The answer to the foregoing question is thought to be "yes" for two reasons:

(a) The statute is repugnant to the due process clause, not only because it permits the state appellate court to cut off the rights of persons adversely interested without giving them a chance to defend (Question 1), but also because it permits the appellate court to give final judgment for the plaintiff when, in view of the fact that the appellate court knows from the record that the plaintiff never proved a case for opening said accounts and has no reason to suppose that she even alleged one, it knows there is nothing that the adverse parties are either required to or can defend against.

(b) The statute is repugnant to the equal protection clause because of its unequal and capricious operation.

Under it, the appellate court may, in one case where a plaintiff has neither alleged nor proved a case, give judgment against the plaintiff and for persons adversely interested, and then, in the next such case, give precisely the opposite judgment. In this case, it did give the precisely opposite judgment; it gave judgment *for* the plaintiff and *against* all persons adversely interested.

Questions Presented, Conclusion.

The brief statement in each of the foregoing questions of the ultimate facts material to it, incredible as the facts may appear when stated thus baldly, is accurate and exact and is in each case fully supported both by the record and by the detailed statement of the record facts set forth in the late Mr. Wisner's jurisdictional statement beginning on page 5 and ending on page 23. As that statement of the facts is nearly as short as it can be and still be a fair and accurate statement of the case, and since it is available to the Court for reference if the Court so desires, it is thought that it would be improper to burden the Court with a substantial repetition of it here.

GROUNDS FOR REHEARING.

Since the Court reached the question of the substantiality of the foregoing questions, it is assumed that all strictly jurisdictional questions were resolved *in favor* of jurisdiction. This petition for rehearing will therefore be confined to the question of the substantiality of the federal constitutional questions presented.

If the past decisions of this Court are properly understood by counsel, this Court considers its jurisdiction on appeal to be compulsory. (For example, see the grounds of decision in *Angel v. Bullington*, 330 U. S. 183, 91 L. Ed. 832, 67 S. Ct. 657.) Therefore, when this Court dismisses an appeal for want of a substantial federal question, there

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has been an adjudication on the merits of the appeal; the federal questions presented by the appeal have been held to be "frivolous." *Matthews v. Huwe* (1925), 269 U. S. 262, 265, 70 L. Ed. 266, 268, 46 S. Ct. 108. *Van Huffel v. Harkelrode* (1931), 284 U. S. 225, 76 L. Ed. 256, 52 S. Ct. 115, 78 A. L. R. 453. Since this Court has therefore decided the federal questions in this case on their merits, the decision in this case is apparently as much an authority for the future as any other decision of this Court provided there are counsel sufficiently industrious to look in the record to see what the questions are that the Court has held frivolous.

In the opinion of counsel, this petition for rehearing is therefore justified, for two reasons:

I. The decision holding that the first question stated above is frivolous would seem to overrule practically every case in which this Court has ever held that the XIV Amendment guarantees to litigants in a defensive position a chance to have a hearing on the merits.

II. Unlike the first question, each of the other three questions involves some element of novelty. However, in the case of these three questions also, the holding that they are frivolous would seem to disturb principles long regarded as settled. Certainly the holding is inconsistent with any thought that the XIV Amendment guarantees such litigants the substance of a chance to defend on the merits and thus save themselves from being stripped of their rights capriciously and without cause.

The federal questions presented by this case therefore do involve matters of general importance and the decision of this Court upon them may properly be said to be a matter of public interest.

I.

The appellee, Mrs. Kaminski, has never disputed that the late Mr. Wisner did have a right to be heard in this case. She could hardly have done so; the Court of Appeals' order making Mr. Wisner a party to this case, which is still undisturbed and in full force and effect, expressly adjudicates that Harry J. Wisner is an interested party with the right to appear and be heard. Moreover, there is an implicit adjudication in the same order that the same thing is true of J. Frederick Bryan. See said order, and also the affidavit found in said order to be true, on pages 9 and 10 of the late Mr. Wisner's jurisdictional statement.

Mr. Bryan has of course never been heard in any way in any court on any point connected with any part of this case. This is the first chance he has ever had to be heard even on his right to be heard.

The late Mr. Wisner never had any more chance than Mr. Bryan to be heard on the *merits* of either of the two litigations in which the Court of Appeals gave judgment in this case. One of the litigations has never been tried at all. Consequently it is impossible for *anyone* to have been heard on its merits. The other, the litigation involving the "Application to Appoint Successor Fiduciary," was tried on its merits by the Probate Court, but without notice to or the knowledge of either Mr. Wisner or Mr. Bryan. What subsequently happened to Mr. Wisner in this case was this:

After Mr. Wisner was admitted to the case as a party, the Ohio law permitted him to do only one thing in the Court of Appeals, namely, to offer argument in support of the proposition that the trial court's judgment was free from any error *prejudicial to Mrs. Kaminski* and therefore ought to be affirmed, and not reversed and remanded for a new trial. The Court of Appeals heard Mr. Wisner on no other question; the one constitutional question argued prior to the decision of the Court of Appeals by which

the rest of the constitutional questions were raised was of course incident to the proposition just mentioned. Thereafter, for reasons it did not disclose, the Court of Appeals found that the Probate Court had been guilty of error prejudicial to Mrs. Kaminski and reversed its judgment. However, the Court of Appeals did not give Mr. Wisner a chance to be heard on the ultimate merits of the case by remanding to the Probate Court for a new trial. Instead, although Mr. Wisner had never been heard or had a chance to be heard on the merits, the Court of Appeals followed the extraordinary course of itself rendering final judgment granting the "Application to Appoint Successor Fiduciary."

For good measure, the Court of Appeals' judgment also decided against Mr. Wisner another case in which it knew Mr. Wisner had an important pecuniary interest, namely, the alleged action by Mrs. Kaminski against the late Mrs. Wisner to open Mrs. Wisner's accounts as her guardian. That case was of course not at issue, had never been tried, even *ex parte*, and was not before the Court of Appeals because no appeal had been taken in it. Neither Mr. Wisner nor anyone else had ever had any chance to be heard on its merits; the Probate Court had not as yet decided whether any such action had ever been commenced.

This Court has itself repeatedly expressed far better than counsel could do the fact that the 14th Amendment forbids the states to condemn the rights of litigants without a hearing. For example:

> "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement." *Riverside & Dan River Cotton Mills v. Menefee* (1915), 237 U. S. 189, 193, 59 L. Ed. 910, 912, 35 S. Ct. 579.

> "The order, in effect, denied the respondent a hearing. It is alleged he was in the position of an alien enemy and could have no *locus standi* in that forum.

If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization." *McVeigh v. United States* (1870), 11 Wall. (78 U. S.) 267, 20 L. Ed. 80, 81.

"A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh* (1876), 93 U. S. 274, 277, 23 L. Ed. 914, 916.

"The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." *Hovey v. Elliott* (1897), 167 U. S. 409, 414, 42 L. Ed. 215, 219.

Quotations and citations on this subject can be multiplied indefinitely. *Powell v. Alabama* (1932), 287 U. S. 45, 68, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64. However, the foregoing quotations are perhaps sufficient to illustrate the principle involved.

It is respectfully submitted that Question 1 presents a substantial federal question for the reasons set forth in both paragraph (a) and paragraph (b) of the comment on that question.

II.

Equally with "Question 1," the federal constitutional questions stated above as Questions 2, 3 and 4 involve applications of the principle that the 14th Amendment forbids a state to condemn a person's rights without giving him the opportunity to have the reality of a day in court.

Question 2, which attacks the constitutional validity as a pleading of the "Application to Appoint Successor

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Fiduciary," involves a somewhat specialized application of that principle. On the principle that a party has a chance to have a fair hearing on the merits only of those issues with respect to which he has been put on notice by the pleadings, it has long been held that courts depart entirely from their jurisdiction when they give judgment against a party with respect to issues not raised by the pleadings. *Reynolds v. Stockton* (1891), 140 U. S. 254, 35 L. Ed. 464. *Hovey v. Elliott* (1897), 167 U. S. 409, 445-6, 42 L. Ed. 215, 230-1. The "Application to Appoint Successor Fiduciary" is clearly so equivocal and ambiguous that it is impossible to know what the ultimate issues tendered by it, if any, are. As a result, it is believed that it tenders no issue whatever. Therefore, any judgment upon it is a judgment *outside* the issues. Consequently, it is believed to be constitutionally invalid as a pleading, and the statute which authorizes it is therefore believed to be constitutionally invalid also.

In view of the brevity which is especially appropriate in the case of a petition for rehearing, reliance is placed, in connection with Questions 3 and 4, entirely in the nature of the questions themselves and in the short comments which follow the statements of said questions above. As interpreted and applied by the Court of Appeals of Columbiana county in the particulars mentioned in said questions, Ohio General Code § 10506-55 seems clearly repugnant both to the equal protection and due process clauses of the 14th Amendment.

It is respectfully submitted that Questions 2, 3 and 4 above also present substantial federal questions.

CONCLUSION.

The same issue of the New York Times which carried in small print the intelligence that this case had been dismissed for want of a substantial federal question carried many columns dealing with the action of this Court in connection with important matters of state, including among

others the Japanese war crimes trials and the matter of how one of the States was to cast its vote for the presidency. By comparison, this case might seen trivial and inconsequential. It involves nothing except whether ordinary individuals in an inconspicuous position in life have a right to be heard before their rights are condemned. However, because it does involve this question, it is respectfully submitted that this case also is a matter of great consequence.

* * * * *

In the interest of giving this Court an opportunity to deal comprehensively if it should so desire with the federal rights of all the persons whose rights were adversely affected by the judgment in this case of the Court of Appeals of Columbiana county, Mr. Bryan has considered it his duty to submit himself to this Court's jurisdiction individually as well as administrator. However, if the Court lacks the time to give careful consideration to the effects of the Court of Appeals' act in foreclosing Mr. Bryan's individual rights without notice to him, it would be a most gracious act on the part of the Court to *deny* Mr. Bryan's application to intervene in his individual capacity. He would thus be left such remedies against the judgment of the Court of Appeals, if any, as he would otherwise have as an individual in the lower state or federal courts.

WHEREFORE, and for other reasons appearing in the jurisdictional statement and brief of the late appellant, Harry J. Wisner, petitioner J. Frederick Bryan respectfully urges that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

RALPH ATKINSON,

Attorney for J. Frederick Bryan.

CERTIFICATE OF COUNSEL.

I, Ralph Atkinson, an attorney and counsellor regularly admitted to practice in the Supreme Court of the United States, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that in my opinion said petition is well founded.

RALPH ATKINSON.

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vs.

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CATHERINE MILLER WISNER KAMINSKI.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

SUGGESTION OF APPELLANT'S DEATH and APPLICATION TO SUBSTITUTE PARTY.

RALPH ATKINSON,
352 East State Street,
Salem, Ohio,
Counsel for Applicant.

LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8242

In the Supreme Court of the United States

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OCTOBER TERM, 1948.

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KATHLEENE KAMINSKI, a.k.a.
CATHERINE MILLER WISNER KAMINSKI.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

SUGGESTION OF APPELLANT'S DEATH and APPLICATION TO SUBSTITUTE PARTY.

Pursuant to paragraph 1 of Rule 19, applicant J. Frederick Bryan respectfully suggests to the Court the death from a heart attack of appellant Harry J. Wisner pending the appeal in this cause. The appeal to this Court was duly allowed August 30, 1948, and said appellant died subsequently, on October 3, 1948.

November 8, 1948, applicant was duly appointed and forthwith qualified as the administrator with the will annexed of the Estate of said Harry J. Wisner, deceased, and applicant is now the duly appointed, qualified and acting representative in the personalty of said decedent, which includes said decedent's half interest in the fund deposited to secure the sureties of applicant's mother and said decedent's late wife, Anna Miller Wisner, as guardian of her daughter, Mrs. Kathleene Kaminski, the appellee in this cause. (See Jurisdictional Statement, pages 6 and 22.)

Applicant, as the son of the late Anna Miller Wisner, also succeeds Harry J. Wisner as the person who, if a personal representative of the late Anna Miller Wisner is to be appointed by the Probate Court of Columbiana county, Ohio, has a statutory right to *be* the personal representative of said Anna Miller Wisner, deceased. (See J. S., pages 9 and 10.) Applicant now is, and at all times since his birth on June 19, 1904 has been, a resident of and domiciled in said Columbiana county and is the only next of kin of Anna Miller Wisner who has been either a resident of or domiciled in Columbiana county at any time since her death on November 10, 1943. (See *In re Golembiewski*, 146 Ohio St. 551, 67 N. E. 2d 328, and the statutes cited next below.) Applicant has at all times had a statutory right to notice of and an opportunity to be heard in any proceedings for the appointment of a personal representative for his deceased mother by said Probate Court of Columbiana county (Ohio G. C. §§ 10509-3 and 10509-4), but had no notice or knowledge, actual or constructive, of the proceedings in this cause until after the judgment of the Supreme Court of Ohio from which this appeal is taken.

Applicant, as the brother of the appellee, Kathleene Kaminski, is also a person with a statutory right both to notice of and to an opportunity to be heard in any proceedings in the Probate Court of Columbiana county to appoint a guardian of appellee. He is appellee's only next of kin who is either domiciled in or a resident of said county. (Ohio G. C. § 10507-4.)

In addition to the several injuries inflicted by the courts below on applicant's decedent Harry J. Wisner, said courts' adverse final adjudication in this cause of applicant's own rights in the premises without any notice to him, and without affording him any opportunity whatever to be heard, has denied the equal protection of the laws to applicant as an individual and has, without due

process of law, destroyed his personal rights, contrary in each case to the express provisions of § 1 of the XIV Amendment to the Constitution of the United States.

WHEREFORE: Applicant J. Frederick Bryan respectfully and voluntarily moves, both as administrator with the will annexed of the Estate of Harry J. Wisner, deceased, and individually, that he may be admitted to this suit as party appellant in the place and stead of appellant Harry J. Wisner, now deceased.

RALPH ATKINSON,

Attorney for J. Frederick Bryan.

SUPPORTING AFFIDAVIT.

STATE OF OHIO,
COLUMBIANA COUNTY, ss.

J. Frederick Bryan, being first duly sworn according to law, says that he is the son of the late Anna Miller Wisner, that he was born June 19, 1904 during her marriage to his father, the late George H. Bryan, that the deceased appellant Harry J. Wisner was his step-father, that he is the duly appointed, qualified and acting personal representative of his said step-father, that the appellee Kathleene Kaminski is his sister, and that the facts stated and allegations contained in his foregoing SUGGESTION OF APPELLANT'S DEATH AND APPLICATION TO SUBSTITUTE PARTY are true.

J. FREDERICK BRYAN.

Sworn to before me and subscribed in my presence at Salem, Ohio this 14th day of December, 1948.

RALPH ATKINSON
RALPH ATKINSON, *Notary Public*
My Commission Expires Jan. 24, 1950.